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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 177.

JULES S. BACHE,
Appellant,

against

SAMUEL HUNT, as Receiver of the Toledo, St. Louis and Kansas City Railroad Company and Toledo, St. Louis and Western Railroad Company,
Appellees.

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STATE OF NEW YORK, }
County of New York, } ss.:

F. SPIEGELBERG, being duly sworn, says that he is one of the solicitors and of counsel for the appellant herein, and has had charge on behalf of the appellant of all the proceedings taken herein. Deponent has read the affidavit of Adrian H. Joline in support of this motion. Mr. Joline omitted to state that before the filing of the petition of the receiver Hunt, the Supreme Court of the State of New York, in an action brought by the appellant, took, through its receiver, possession of the securities in the hands of the Farmers' Loan & Trust Company, which are referred to in said affidavit. These securities had been without the jurisdiction of the United

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4 States Circuit Courts, in which the foreclosure case was pending long before the institution of such suit, and have remained without such jurisdiction ever since. These bonds in the possession of the New York Supreme Court are the basis of the controversy of the parties hereto.

Deponent further says that Mr. Joline is in error when he states that the decree of foreclosure and the order of confirmation are a part of the record, although it appears that the court below referred to the same in its opinion. Deponent further says that in his opinion the papers desired to be included in the record are not necessary for a deci-
5 sion of the jurisdictional questions involved, and that the relation both of the receiver and the Toledo, St Louis and Western Railroad Company to the securities in question sufficiently appears from the record as it now stands.

Deponent further says that the record was made up according to his direction, and that the same is in accordance with the rules both of this court and the court below. The decree from which this appeal is taken was entered in the Circuit Court on December 4th, 1902. The same day the appellant filed his assignment of errors (Record, page 106), the 16th and 17th assignment of which bring up the action of the court below in considering mat-
6 ters outside of the record. Some of these matters are now sought to be included in the record. On December 10th, 1902, the *præcipe* for the transcript of the record to the clerk of the Circuit Court was filed, specifically mentioning the papers to be included therein and containing the following statement: "You will also please include in said transcripts "all entries of any other pleadings, proceedings "and papers on your appearance docket in the "matter of the petition of Samuel Hunt, etc., as "aforesaid, and certify to that effect" (Record, page 120).

And the Clerk's certificate (page 121), states:

"I further certify that the foregoing transcript 7
"contains all the papers which appear noted on
"the appearance docket in the above-entitled
"cause in the matter of the petition of Samuel
"Hunt, as receiver".

The transcript was filed in this Court on December 29, 1902, and the printed copies thereof were received by this deponent from the Clerk of this Court on January 12th, 1903. Messrs. Butler, Notman, Joline & Mynderse, of which firm Mr. Joline is a member, and Messrs. Brown and Geddes have acted throughout this proceeding as solicitors for the receiver or the purchaser, and had notice or ought to have taken notice of all the proceedings taken by the deponent for the purpose of perfecting this appeal to this court. If they felt aggrieved 8
by any omissions in the record they should have acted promptly and not waited for one year after the record had been in print and until almost the eve of the argument.

Deponent further says that he had nothing to do with choosing the name or title of this appeal but, as he is informed and believes, the clerk of this court entitles an appeal in accordance with the names of the parties appellant and appellee as they appear from the citation.

F. SPIEGELBERG.

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Sworn to before me this 14th day of January, 1904.

J. MANHEIMER,
[SEAL.] Notary Public,
New York County.

10 SUPREME COURT OF THE UNITED STATES,

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JULES S. BACHE,
Appellant,

against

SAMUEL HUNT, as Receiver of the Toledo, St Louis, and Kansas
11 City Railroad Company and Toledo, St. Louis and Western Railroad Company,
Appellees.

Memorandum in opposition to motion for writ of certiorari to supply diminution of the record.

It appears from the affidavit and the memorandum herein of Mr. Joline that the reasons urged in support of this motion are:

12 *First.*—The final decree of foreclosure and the order of confirmation were made a part of the record.

Second.—The decree is essential for the determination of the questions involved on this appeal for the reason that it shows that this proceeding is ancillary to the foreclosure case.

Third.—The decree is essential for the reason that section four thereof covers the claim made by the appellees.

Fourth.—That the confirmation of sale contains

a reservation as to the distribution of the proceeds of sale under foreclosure. 13

We shall briefly answer these reasons in order:

First.—The decree and order were not made a part of the record. The certificate of the Clerk is presumptive evidence of the correctness of the record and becomes conclusive unless errors are shown and pointed out.

In *Pacific Railroad Company* vs. *Missouri Pacific R. R. Co., 111 U. S., 505*, it appears that in an action brought by one Ketcham, a decree of foreclosure and sale was entered against the railroad corporation, and that subsequently the cor- 14
poration filed its bill in the same Court alleging fraud in the foreclosure suit, and praying that the decree in the Ketcham suit be set aside. On page 518, Mr. Justice BLATCHFORD, delivering the opinion of the Court, says:

> "It follows, that the record in the Ketcham
> "case was never made part of the record in
> "this case, so far as appears from the only
> "record which is before this Court, on this
> "appeal. In regard to the bill in the Ketcham
> "suit, and the decree, and the master's deed,
> "and the order approving the deed, they
> "are made a part of the bill in this suit,
> "and identified by the annexing of copies. 15
> "But the statement in the bill that the plaint-
> "iff prays liberty to refer to the files and
> "records of the Circuit Court in the Ketcham
> "suit, to show such and such things, can be
> "of no force or effect to allow either party to
> "claim, in this court, the right to produce or
> "refer to anything, as answering the descrip-
> "tion of such files and records, which it may
> "assert to be such, or as being what the Cir-
> "cuit Court considered as before it. One of
> "the assignments of error, on this appeal, is
> "that the Circuit Court considered matters
> "outside of the record, and matters not em-
> "braced in the bill. We are of the opinion
> "that *this court cannot consider anything*
> "*which is not contained in the bill and the*

16 "*exhibits which are annexed to it*, and that it "cannot look into anything otherwise pre- "sented as the files and records of the Ketcham "suit, or of any other proceedings in any "court, for the purpose of determining the "question arising on the demurrers to this "bill."

Second.—The petition and all of the proceedings taken thereon, as they appear in the transcript of record, abundantly show the existence and status of the foreclosure case, and that the petition and all the other proceedings thereon were entitled in the name of the foreclosure case. If the petition is an ancillary or
17 dependent proceeding in the foreclosure case it sufficiently appears from the record and the decree adds no strength to it.

Third.—The fifth section of the decree adjudges: "All said first mortgage bonds so issued are now "outstanding in the hands of divers persons and "corporations, who are owners and holders thereof "for value."

And the ninth section: "The principal of all "said bonds is now due and payable, and there is "due and owing in respect of said first mortgage "bonds, at the date of the entry of this decree,
18 "the principal thereof $9,000,000, and for the in- "terest thereon, the following amounts."

In the face of this conclusive adjudication the assertion is made that the bonds in controversy which are included in said provisions of the decree are assets of the insolvent railroad company and passed under the sale of foreclosure to the purchasers. If the appellees have any claim to these bonds it is by virtue of the doctrine of equitable subrogation for the reason that the receiver paid the prior liens, for the payment of which these bonds were security, out of the moneys in his possession arising from the operation of the road. The receiver

took this position in his petition in the Twentieth paragraph thereof (Record, page 13), which states:

"By the terms of said decrees of foreclosure and "sale hereinabove set forth, it is adjudged that "said first mortgage of said respondent railroad "company is a lien upon all moneys, profits and "income derived by any receiver in said causes "from the operation of said mortgaged railroad "and property."

This is an exact quotation of the essential portion of the fourth paragraph of the decree and sufficient to establish the claim of the appellees, if any they have. The inclusion of the decree, therefore, in the record on this ground to show the claim of the appellees is unnecessary.

Fourth.—The decree itself contains no reservation of the distribution of the proceeds of sale. The only questions reserved for future determination are, first: what, if any, coupons maturing prior to June 1st, 1893, are outstanding and unpaid; and, second: what, if any, other claims not adjudicated are a charge on the proceeds of sale of the mortgaged property prior in lien or equity to the mortgage debt, and the amount thereof. The order of confirmation, as far as it makes any other reservation is void and *coram non judice* as attempting to change, alter or enlarge the final decree.

Farmer's Loan & Trust Co. v. *Newman*, *127 U. S.*, *649*, *660*.
Central Trust Co. v. *Grant Locomotive Works*, *135 U. S.*, *207*, *224–5*.

Head note by Miller, J., in *Bronson* vs. *Schulten*, *104 U. S. 410*.

The petition of the receiver clearly states the relation of the parties to the securities in question, and is supplemented by the petition of the Toledo, St. Louis & Western Railroad Company and the order entered thereon (*Record, pages 71–74*). The essential provisions of the final decree other

than the one above mentioned are contained in the record on page 86.

The vital question on this appeal is whether the Circuit Court has the right to interfere with property which long before the institution of the foreclosure was without its jurisdiction and over which it never exercised or attempted to exercise any jurisdiction and which prior to the institution of this proceeding had been taken into the judicial custody of the Supreme Court of the State of New York.

The record before this court is in accordance with the rules and practice thereof, and contains all the essential facts necessary for a review of the case.

No sufficient ground for a correction of the record having been shown, it is respectfully submitted that this motion made at this late date should be denied.

F. SPIEGELBERG,
Counsel for Appellant.